LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 4 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 546

JAMES E. CHANCE,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE L. GORDON, JR.,
SAM D. PARKER,
JACK W. R. HEADLEY,
JOSEPH E. STEVENS, JR.,
15 West Tenth Street,
Kansas City, Missouri 64105,
Attorneys for Respondent.

Of Counsel:
LATHROP, RIGHTER, GORDON & PARKER,
15 West Tenth Street,
Kansas City, Missouri 64105.

E. L. MERSERHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-8930

INDEX

Jurisdiction 2

Questions Presented 3

Statement 4

Argument 7

I. Procedure: The sole question petitioner presents is not properly before this Court because it was never properly raised by petitioner at any stage of the State Court proceedings 8

II. The Substantive Issue: Instruction No. 7, neither expressly nor by implication, denies petitioner any rights under the FELA 10

A. Instruction No. 7 is properly supported by the evidence, and it properly converses plaintiff's causation theory under Missouri law permitting converse instructions 11

B. Instruction No. 7 does not raise any issue of contributory negligence 13

Conclusion 16

Table of Cases

Chance v. *The Atchison, Topeka and Santa Fe Railway Co.* (Mo., 1965), 389 S.W.2d 774 ..... 1, 9, 10, 15

Citizen's Bank v. *Opperman*, 39 S. Ct. 330, 249 U.S. 448 2

Edelman v. *California* (1953), 344 U.S. 357 9

Green v. *Elbert*, 11 S. Ct. 188, 137 U.S. 615 2

Hulbert v. *Chicago* (1906), 202 U.S. 275 9

In re Lamkin (1957), 355 U.S. 59 9

Liebow v. *Jones Store Co.* (1957), 303 S.W.2d 660, 662 11

Samuels v. *Klimowicz* (Mo., 1964), 380 S.W.2d 418, 424 13

OTHER AUTHORITIES

Missouri Rule of Civil Procedure 79.03 ..... 3, 8
Missouri Rule of Civil Procedure 83.05(a) 3, 8
31 Penn. Bar Ass. Q. 393, 399-400 (1960) 9
Rules 21 and 22 of the Supreme Court 2
Rule 23(1)(f) of the Supreme Court 9
Rule 23(h) of the Supreme Court 11
28 U.S.C., Sec. 1257 2
28 U.S.C., Sec. 2101(c) 2
45 U.S.C., Sec. 53 ..... 3, 7, 8, 14, 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 546

JAMES E. CHANCE,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR RESPONDENT IN OPPOSITION

This brief is filed on behalf of The Atchison, Topeka and Santa Fe Railway Company, Respondent, in opposition to Petition of James E. Chance for writ of certiorari to the Supreme Court of the State of Missouri to review the judgment of said court, entered April 12, 1965, affirming the unanimous jury verdict and judgment thereon for this respondent in the Circuit Court of Jackson County, Missouri, at Kansas City. Petitioner's motion for rehearing or transfer to the Missouri Supreme Court, *en banc,* was overruled on May 10, 1965. *Chance* v. *The Atchison, Topeka and Santa Fe Railway Co.* (Mo., 1965), 389 S.W.2d 774.

JURISDICTION

Petitioner claims jurisdiction of this Court is invoked by virtue of the certiorari provisions of 28 U.S.C., Sec. 1257.

Respondent objects to the jurisdiction of this Court to grant a writ of certiorari because Petitioner has failed to comply with Section 2101(c) of Title 28 U.S.C., and Petitioner has failed to comply with Rules 21 and 22 of this Court.

I. *Failure to Comply with Section 2101(c) of Title 28 U.S.C.*

The petition states (p. 2) that the judgment of the Supreme Court of Missouri was entered on April 15, 1963, and a motion for rehearing was denied May 10, 1965. 28 U.S.C. 2101(c) provides that a writ of certiorari shall be applied for within ninety days after the entry of the judgment. The ninety-day period after May 10, 1965, expired August 8, 1965, and during this period petitioner did not apply for the writ. This Court cannot, therefore, issue such a writ. *Citizen's Bank* v. *Opperman*, 39 S. Ct. 330, 249 U.S. 448.

Neither was the case docketed within the ninety day period, and this again is fatal. *Green* v. *Elbert*, 11 S. Ct. 188, 137 U.S. 615.

II. *Failure to Comply with Rules 21 and 22 of this Court.*

Rules 21(1) and 22(3) require the filing of a petition and certified transcript of the record within the time prescribed by law.

Respondent is informed and believes that the petition in this cause was not filed until August 10, 1965, and that the certified transcript of the record (nor any part thereof) was not filed until September 8, 1965. Respondent is further informed and believes that the cause was not docketed until September 8, 1965, well beyond the ninety-day limitation of the statute and the rules.

Since petitioner has failed to comply with the applicable statute and rules, this Court has no jurisdiction and this petition should be dismissed or denied. However, we will demonstrate that in no case should a writ be issued.

QUESTIONS PRESENTED

As to Procedure: Should this Court now consider the sole question raised by petitioner (that a jury instruction improperly injected contributory negligence as a complete bar to recovery) when petitioner failed to raise such question at the time the jury instruction was given by the trial court (1094), failed to raise such question in his assignment of errors in his motion for new trial filed in the trial court (T. 1104-08), as required by Missouri Rule of Civil Procedure 79.03, and failed to raise such question in "Points Relied On" in his brief to the Missouri Supreme Court (page A 32, Petition), as required by Missouri Rule of Civil Procedure 83.05(a).

As to the Substantive Issue: Whether a jury instruction conversing petitioner's sole theory of causation improperly injected contributory negligence as a complete bar to petitioner's recovery and in violation of 45 U.S.C., Sec. 53?

STATEMENT

Because petitioner's statement of facts fails to tell this Court what petitioner's theory of negligence was at trial, and because the statement is otherwise incomplete, defendant makes this additional statement of the case and facts material to a consideration of the questions presented.

Petitioner testified that on June 19, 1960, he was standing between track 55 and track 56 on a curve in respondent's bowl yard when a car or cars coupled into two standing coupled hopper cars on track 55 causing one of these standing hopper cars to jump out sideways 8 inches or so and hit him causing him injuries (T. 149, 150, 296, 297). Petitioner further stated that any time you put pressure on a string of cars there is a side swing to cars, and if it's on a curve, they will swing either way, about 8 or 10 inches or approximately a foot of side swing. It all depends on how much pressure there is on the cars (T. 290).

Petitioner's sole theory of negligence submitted to the jury was that the moving car or cars coupled into the standing hopper cars at a speed in excess of the 4 miles per hour allowed by respondent's work rules, and that such excessive speed caused the injury. Petitioner's verdict-directing instruction given by the trial court reads as follows:

"Instruction No. 1

"The court instructs the jury that if you find and believe from the evidence that the plaintiff, Jim Chance, was in the employ of the defendant on June 19, 1960, and that on that day he was working as a switchman handling freight cars in the Bowl Yard of the defendant at the Argentine Yards in Kansas City, Kansas, and was working below and West of the so-called hump, and that as a part of his regular duties

> he was in a position on the curve between track 55 and track 56 and West of the 42nd Street Viaduct and that he was then and there violently struck by a hopper car standing on track 55 when it was struck by a car or cars which defendant had caused and permitted to roll off the hump Westward on track 55 at a speed in excess of that allowed by the defendant's rules to-wit four (4) miles per hour, and at an excessive and dangerous rate of speed, and if you further find that, in so causing and permitting said car or cars to roll at such speed off the hump on track 55 and to strike the hopper car standing on track 55, the defendant failed to exercise ordinary care and was negligent and that plaintiff was injured as a direct and proximate result of said negligence, then your verdict must be in favor of the plaintiff and against the defendant." (T. 1094-95).

Petitioner did not see the moving cars which coupled into the standing hopper cars (T. 300). Nor did he see the standing hopper car "swing out" and hit him (T. 297, 299). No one testified for petitioner, other than petitioner himself, that standing cars swing out in such fashion when moving cars couple into them.

Several witnesses for respondent testified that railroad cars, including hopper cars, do not swing out, sway out or jump out as much as 8 to 10 inches or a foot during a coupling of these cars coming off the hump, whether on straight or curved track (T. 747, 752, 756-757, 821-822, 835-836, 905-906, 922-923, 1049). Further, witnesses for respondent explained why, because of the manner of car construction and close clearance problems in railroading, it was impossible and impracticable for cars to have such lateral or sideways movement (T. 1049-1051, 755, 757). The maximum lateral movement of these cars is about 2 inches at most, and if they moved sideways or swung out as much as 8 inches they would derail (T. 822, 752-753, 907).

The two hopper cars standing on track 55 at the time in question were loaded with sand weighing about 75 tons each (T. 771, 773). The other car was loaded with flour weighing about 55 to 60 tons (T. 775-776). A loaded car coming down off the hump and coupling into these two standing hopper cars at a speed of 4 miles per hour, with a skate on the far end of the hopper cars, would cause the hopper cars to move at least a half car length or about 20 to 25 feet (T. 777).

Adjoining sets of railroad tracks on a curve are placed farther apart than adjoining sets of track on straight-a-way (T. 784). Measurements show that at the curve between tracks 55 and 56 the distance between tracks is wider than at other points (T. 813-814).

Petitioner told respondent's safety supervisor Storey, on the same day the accident occurred, that "he was standing at the coupler opening *on track* 55 between two hopper cars, and that a car came down off the hump and struck these cars, and he was hit by one of the cars on the right side, and that it threw him over into the cars on 56 track" (T. 834). If you stand on a track where there are two hopper cars on that same track, and if you are standing on that track at the coupler opening, you are in a position where you will be struck if the cars are moved (T. 851-852).

The petitioner previously sued this respondent claiming total permanent disability as the result of an accident on June 24, 1951. This case went to trial in May, 1952, and petitioner was awarded $20,000 damages by a jury based on petitioner's testimony that he would never be able to work again as a switchman as well as the testimony of his doctors who stated he would never be able to work again (T. 333-335, 345-346). In August, 1952, a little over two months after the said jury verdict, and after the judg-

ment entered thereon was paid to petitioner, petitioner filed a written bump with respondent demanding that he be put back to work as a switchman stating that he was ready, willing and able to work (T. 1041-1042, 1036-1037, 346-347). In May of 1956, the Labor Board ordered that Chance be reinstated and put back to work (T. 1044).

ARGUMENT

The petition, to say the least, is unusual in that it presents a question never properly raised in the Missouri Court system.

We recognize that this Court is not prone to decide cases on procedure if great and substantial questions on the merits are involved. However, the question presented by the petition, when analyzed, does not present a novel or substantial question, or one in conflict with applicable decisions of this Court. Instead, it simply asks the Court to take a look at a Missouri jury instruction to see if this Court agrees with the Missouri Court on a theory that petitioner never properly presented to, but which was decided by, the Missouri Court, to wit: whether the jury instruction in question submits plaintiff's contributory negligence as a bar to his recovery and therefore conflicts with 45 U.S.C., Sec. 53.

This Court has repeatedly held that certiorari may not be used by a defeated litigant merely for the purpose of securing a second appellate review of his case.

I. Procedure: The sole question petitioner presents is not properly before this Court because it was never properly raised by petitioner at any stage of the State Court proceedings.

Petitioner now claims Jury Instruction No. 7 improperly injected contributory negligence as a complete bar to recovery and in violation of 45 U.S.C., Sec. 53.

Petitioner did not make such objection at the time the trial court gave Instruction No. 7 (T. 1094).

Petitioner did not make such objection or preserve such point in his motion for new trial before the trial court (T. 1104-08). This in violation of Missouri Civil Rule of Procedure 79.03 requiring that allegations of error and specific objections to instructions be made in the motion for new trial to preserve error for appellate review, and which Rule reads, in part, as follows:

> "79.03 Motion for New Trial—Allegations of Error Required
>
> Allegations of error, in order to be preserved for appellate review, must be presented to the trial court in a motion for a new trial; * * * If any specific objections to instruction have not been made at the trial before submission to the jury, then such specific allegations of error in instructions must be set forth in the motion for new trial to preserve the error for review."

Nor did petitioner, in his brief to the Missouri Supreme Court, follow Missouri Rule 83.05(a) by raising such question in his "Points Relied On" (page A32, Petition). Petitioner did, parenthetically, inject the question in one sentence of a paragraph in the Argument portion of his brief (page A32, Petition).

The Missouri Supreme Court did not rest its opinion on the fact petitioner failed to present properly the present

question for review. Instead, it considered the question and rejected petitioner's contention. 289 S.W. 2d 774, 778, 779.

The procedural principles established by this Court seem clear that the litigant must follow state procedures in raising the federal question, and any failure to do so should prove fatal to his chances for Supreme Court review. *In re Lamkin* (1957), 355 U.S. 59. Also see *Hulbert* v. *Chicago* (1906), 202 U.S. 275 (complete failure to raise question at trial court level); *Edelman* v. *California* (1953), 344 U.S. 357 (failure to raise issue at trial).

Perhaps the principle is best stated by the late Mr. Justice Brennan in an article entitled *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 399-400 (1960), as follows:

> "But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. *First*, the federal question must be a substantial question. *Second*, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. *Third*, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law."

Actually petitioner has been changing his theory of attack as he has progressed through the various courts. This becomes clear when analyzing the effort in the petition to state where the question had been raised below.

The petition obviously fails, and understandably so, to follow Rule 23 (1)(f) of this Court that one seeking review of a state court decision must "specify the stage in the proceedings in the court of first instance and in the

appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; * * *"

For the above reasons alone, certiorari should be denied.

II. The Substantive Issue: Instruction No. 7, neither expressly nor by implication, denies petitioner any rights under the FELA.

The petition is asking this Court to do all the work! It fails to give this Court any specifics—it simply makes sweeping charges, without reason or explanation, that:

(1) The Missouri Supreme Court failed to follow the F.E.L.A.;

(2) The Missouri Supreme Court, by approving Instruction No. 7, denied petitioner federal rights;

(3) The decision of the Missouri Supreme Court frustrates the intent of Congress; and

(4) The Missouri Supreme Court treats with a federal question not heretofore determined by this Court (pp. 5 and 6, Petition).

The above is the sum total of petitioner's argument and reasons why certiorari should be granted. Not once (in any of the four points enumerated) does he say "why" or "how". Nor does petitioner's inclusion of a portion of his brief to the Missouri court in the appendix to the petition (page A32, *et seq.*) provide any answer. In fact, the opinion of the Missouri court goes to some length treating with petitioner's complaint that Instruction No. 7 did *not* require a finding that plaintiff was contributorily negligent. 389 S.W.2d 774, 778-9. *Now petitioner complains to this Court that it did!*

If petitioner wishes to take the time to present to this court a question that Instruction No. 7 improperly in-

jects contributory negligence as a complete bar, why doesn't he tell us how this is so?

It would seem that by dangling the question before this Court, without explanation, petitioner would hope to invoke the Court's imagination in a "guessing game" as to what petitioner has in mind, and thus perhaps strike on an idea novel even to petitioner. Either this is so or petitioner has forgotten Rule 23(h) calling for an argument amplifying the reasons relied on for allowing the writ.

Although petitioner says the opinion of the Missouri Supreme Court, in approving Instruction No. 7, is wrong, he refuses to discuss it further or point out why it is wrong. Nonetheless, we are constrained to make the following argument on why Instruction No. 7 properly followed Missouri law and was not in violation of federal law.

A. Instruction No. 7 is properly supported by the evidence, and it properly converses plaintiff's causation theory under Missouri law permitting converse instructions.

At this point we believe it is necessarily in order to explain just what Instruction No. 7 is and how it follows Missouri procedure permitting a defendant to converse any element essential to a recovery by plaintiff.

Instruction No. 7 is in the nature of a converse instruction on "excessive speed" which was the sole basis for negligence and causation submitted to the jury by plaintiff's Instruction No. 1. In effect, Instruction No. 7 converses causation since it asks the jury to find for defendant if they do not believe plaintiff sustained damage as a direct result of "excessive speed".

The Missouri Supreme Court, in explaining permissible converse instructions, stated in *Liebow* v. *Jones Store Co.*, (1957) 303 S.W.2d 660, 662:

> "There is no set form for what is referred to as a converse instruction. The defendant can submit either the exact converse of plaintiff's verdict-directing instruction, Janssens V. Thompson, 360 Mo. 351, 228 S.W.2d 743, or the exact converse of any essential element of such instruction. Reger v. Nowotny, Mo. Sup. 226 S.W.2d 596; McCarty v. Milgram Food Stores, Inc., Mo. Sup. 252 S.W.2d 343; Oshins v. St. Louis Public Services Co., Mo. Sup. 254 S.W.2d 630. When either is done the result is what is referred to as a 'true converse instruction' and such an instruction does not require affirmative testimony in support of it. Kimbrough v. Chervitz, 353 Mo. 1154, 186 S.W.2d 461, 464. However, the defendant may also submit facts in an instruction, the existence of which would disprove, that is controvert, one or more of the essential factual elements of plaintiff's case. See Rose v. St. Louis Public Service Co., Mo. Sup. 205 S.W.2d 559. This form of an instruction also is sometimes referred to as a converse instruction. * * *".

Respondent submits that the evidence affirmatively discloses not only that Chance was standing in a three-foot space on Track 55 between the coupled hopper cars at the time the car traveling off the hump coupled into the hopper cars, but that even at a coupling speed of four miles per hour these 75 ton hopper cars would move 20 to 25 feet—more than enough to travel the three foot open space between the ends of the coupled hopper cars. Certainly this is sufficient evidence for the jury to find that plaintiff would have been "so struck and injured" even though the speed of the car was not in excess of four miles per hour. This was the main finding requested by Instruction No. 7, and no mention of contributory negligence is made.

In addition, it was plaintiff's attorney, not defendant's, who opened up the question of a Rule N violation by asking for and receiving the opinion of defendant's witness

Becker that Chance violated such rule (T. 779). However, more significantly, witness Becker explained that the only way a person could get hit down there during a coupling would be if he were standing "afoul" the track or between the couplers where the car would have to hit him (T. 799-800). This because these cars simply don't jump or swing sideways eight inches to a foot as Chance asked the jury to believe.

The evidence was abundant to support the defense that cars do not jump sideways, and, therefore, petitioner simply was in a position where he would have been *so* struck and injured whether the car coming off the hump and coupling onto the standing cars was traveling four miles per hour or over four miles per hour. Since plaintiff's Instruction No. 1 gave the jury a roving commission to find that a speed in excess of four miles per hour was negligence which in some way caused plaintiff's injuries, defendant's Instruction No. 7 simply submits a converse situation permitting the jury to find for defendant if plaintiff would have been so struck and injured at the "non-negligent" speed of four miles per hour.

Where the jury verdict is for defendant, as here, the evidence supporting an accused jury instruction is viewed, on appeal, in a light most favorable to defendant. *Samuels v. Klimowicz,* (Mo., 1964) 380 S.W.2d 418, 424.

B. Instruction No. 7 does not raise any issue of contributory negligence.

A reading of Instruction No. 7 discloses that the Missouri Court was right when it held that the instruction does not submit contributory negligence. Plaintiff's negligence is not even mentioned!

Instruction No. 7 does nothing more than to say that if the jury found defendant was negligent as defined in

Instruction No. 1 (coupling speed of car in excess of 4 miles per hour), then plaintiff cannot recover if the jury finds that he would have sustained the same injury if defendant had not been so negligent.

It should be emphasized here that in Instruction No. 2, petitioner, not respondent, submitted to the jury the question of his own contributory negligence and the related principles of 45 U.S.C., Sec. 53 (T. 1095-96).

The jury had to find one of two things: Either (1) that defendant was not negligent, or (2) that the negligence was immaterial because plaintiff put himself in the position where he would have sustained the same injury if defendant had not been negligent.

Certain negligence principles are axiomatic and need no supporting authority. For example, one may be negligent and not liable. Only when it is shown that the negligence was a proximate cause of the injury does the negligence become actionable. The word "causal" is not synonymous with the word "contribute". Causation is that act which produces injury and without which the injury would not have occurred. Instruction No. 7 is a correct converse instruction on the claimed causation in this case —excessive speed.

Although we are at a disadvantage because the petition makes no effort to explain the claimed error, apparently petitioner is confusing the above principles of actionable negligence and causation with principles of contributory negligence.

Instruction No. 7 permits the jury to find that the negligence (excessive speed) was not actionable if plaintiff would have been *"so struck and injured"* at a non-negligent coupling speed of 4 miles per hour. Petitioner seemingly would argue that this speaks of contributory neg-

ligence. Not so! It is conversing petitioner's sole theory of causation of the injury.

Let us assume that a train is moving at 10 miles per hour, which is a proper speed, but that if it had been moving at 50 miles per hour, such speed would have been excessive and negligent. Assume further that a person puts himself on the track in front of the train so that he is run over and gets his leg cut off and that he would have been so injured by a train going either 10 or 50 miles per hour. What difference does it make if the train is going 10 miles an hour or 50 miles an hour? The negligence is simply not the cause of the injury.

This is not a question of the defendant being negligent and plaintiff being contributorily negligent, as petitioner seems to think. It is a situation where either the jury found that defendant was not negligent (Instruction No. 1), or it found that the defendant's negligence, if any, did not cause or contribute to cause plaintiff's injuries (Instruction No. 7).

Aside from foregoing reasons, we conclude with the express language in the opinion of the Missouri Supreme Court, which opinion petitioner fails to answer or to discuss, that Instruction No. 7:

> "does not submit any acts of the plaintiff as constituting negligence and it does not authorize a finding for defendant on the basis of contributory negligence" (389 S.W. 2d 774, 779).

Perhaps we have dwelt too long and have been guilty of some repetition in our defense of Instruction No. 7. If so, it is because plaintiff's charges of error are so generalized and sweeping in nature, without giving us or the Court anything specific.

CONCLUSION

Petitioner fails to show that the Missouri Court failed to follow Section 53 of 45 U.S.C., or any other section thereof, or that by approving Instruction No. 7, the Missouri Court denied any rights granted to petitioner by Congress, or that the Missouri Court frustrated any purpose or intent of Congress, or that there is any question of substance, federal or otherwise, in issue. The facts and the law demonstrate that the converse is true.

In essence, no substantial federal question, if one at all, has been presented. Again, the Petition should be denied.

Respectfully submitted,

GEORGE L. GORDON, JR.,
SAM D. PARKER,
JACK W. R. HEADLEY,
JOSEPH E. STEVENS, JR.,
15 West Tenth Street,
Kansas City, Missouri 64105,
Attorneys for Respondent.

Of Counsel:
LATHROP, RIGHTER, GORDON & PARKER,
15 West Tenth Street,
Kansas City, Missouri 64105.